

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

AGAPITO BERNABE
MARTINEZ-CARRIZALES,

VS.

UNITED STATES OF AMERICA,

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Civil Action No: SA-12-CA-942-XR
Crim. No. SA-12-CR-34

**ORDER ACCEPTING UNITED STATES
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

On this date, the Court considered the United States Magistrate Judge's Report and Recommendation in the above-numbered and styled case (docket no. 33) and Martinez's objections thereto (docket no. 39). After careful consideration, the Court will accept the recommendation and deny Martinez's motion to vacate, set aside or correct sentence (docket no. 31).

Where no party has objected to the Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review of it. *See* 28 U.S.C. §636(b) (1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made"). In such cases, the Court need only review the Report and Recommendation and determine whether it is either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989). On the other hand, any Report or Recommendation that is objected to requires de novo review. Such a review means that the Court will examine the entire record and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421

(5th Cir. 1987). Martinez filed objections and therefore the Court will conduct a de novo review.

After making an independent review of the pleadings, files and records in this case, of the Report and Recommendation of the United States Magistrate Judge, and of Martinez's objections to the Report and Recommendation, I am of the opinion that the reasons for denial set forth in the Report and Recommendation of the Magistrate Judge are correct and they are hereby adopted and incorporated by reference as the Findings of the Court.

Martinez's objections do not address his initial claims of an alleged speedy trial violation or alleged double jeopardy. Rather, the objections raise new claims of ineffective assistance of counsel by being allegedly told by his trial counsel that he would receive "time served." In addition, he complains that his guilty plea was involuntary because he pled under the impression he would receive "time served." These claims were not raised in his motion and do not alter the analysis conducted by the Magistrate Judge.

Martinez also has filed a motion to amend his motion to vacate (docket no. 40). In that motion he seeks to add an additional claim - the sentencing court improperly used his driving under the influence conviction to place him in criminal history category V. Inasmuch as Martinez seeks to add this new claim well after the magistrate judge issued the Report and Recommendation, the motion to amend is denied as untimely.

Martinez's § 2255 motion to vacate sentence is DENIED. Martinez has not made a substantial showing of the denial of a constitutional right. He has not made a substantial showing that jurists of reason could disagree with this Court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. It is ordered that a certificate of appealability is DENIED.

SIGNED this 8th day of November, 2012.

A handwritten signature in black ink, appearing to read 'Xavier Rodriguez', with a stylized flourish at the end.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE